

care. As stated by *Halsbury's Laws of England*, Third Edition, volume 36, page 450:

"The imposition on a person of a statutory duty does not necessarily absolve him from his liability for negligence in relation to the same matter, and he may by his conduct be in breach both of his statutory duty and of his common law duty."

Undertakers of public transport, such as the Railway Administration, are required at common law to conduct their affairs with reasonable care and diligence. They are under obligation to take all reasonable precautions to avert danger; the greater the danger, the more the precaution. To my mind, a reasonable interpretation of section 37 does not suggest that the legislature intended the Railway Administration to be totally exempted from liability to foreseeable users of private crossings even if an accident occurs as a result of the Railway Administration's own negligence or the negligence of their servants or agents. Section 37 is procedural in nature. It relates essentially to the construction, cost and maintenance of private crossings. Unless it is expressly provided, there cannot be read into the section the intention of the legislature to do away with their common law duty to take care. I am therefore inclined to the view that the Railway Administration's preliminary objection on this point should not be upheld.

*Order accordingly.*

Solicitors: *Joseph & Son; Morris Edgar & Co.*

### MURTHI v. ANNAPOORANI

[O.C.J. (Mohamed Azmi J.) May 26, 1972]

[Kuala Lumpur — Civil Suit No. 1843 of 1968]

*Contract — Act done for benefit of another — Claim for compensation — Contracts (Malay State) Ordinance, 1950, s. 71.*

The plaintiff claimed compensation for services rendered to the defendant in respect of the subdivision of the defendant's undivided share in a piece of land. The plaintiff was entitled to the balance of the share in the land. The plaintiff's husband became interested to develop the plaintiff's land and by an agreement the plaintiff and defendant agreed to have the whole land surveyed and subdivided. No provision was made for payment of expenses in the agreement. The whole land was eventually subdivided into thirty eight lots, each with a separate title. Thirteen of the lots were registered in the plaintiff's name, twenty four in the defendant's name while one lot was surrendered to the State Government as road reserve. Subsequently the plaintiff was induced by her husband to bring the claim for compensation against the defendant.

**Held:** (1) although the plaintiff's act in this case was lawful and was such that the defendant enjoyed the benefit of it, the evidence showed that it was not done for the defendant. The dominant and sole motive of the plaintiff's husband in this case was to benefit himself and his wife in the housing project;

(2) the evidence showed that it was the intention of the plaintiff to carry out the subdivision of the land gratuitously;

(3) in the circumstances as the plaintiff had failed to satisfy the conditions of section 71 of the Contracts (Malay States) Ordinance, 1950, her claim must be dismissed.

#### A Cases referred to:-

(1) *Siow Wong Fatt v. Susor Rotan Mining Ltd.* [1967] 2 M.L.J. 118 at p. 120.

(2) *Ganapathi Bhatta v. Sanna Sedu Beari A.I.R.* (1930) Mad. 644.

#### CIVIL SUIT.

*R. Ponnudurai* for the plaintiff.

B *R. R. Sethu* for the defendant.

**Mohamed Azmi J.:** This is a claim for \$11,843.28 by the plaintiff as compensation for services rendered to the defendant in respect of the sub-division of the defendant's undivided share in a piece of land in the District of Klang under section 71 of the Contracts (Malay States) Ordinance, 1950.

C The facts of this case can be briefly stated as follows. The defendant was the registered owner of 2½ acres of agricultural land held under E.M.R. No. 6186 Lot No. 1796 in the District of Klang. When the plaintiff, who is the niece and adopted daughter of the defendant, got married to Deputy Superintendent of Police Sambanathan Murthi in 1953, the defendant agreed to give her one acre of her land. In pursuance to the said promise, the defendant entered into a written agreement with the plaintiff dated May 20, 1964. (See page 1 of the agreed bundle of documents). Under this May agreement, the defendant agreed to transfer one acre of her Klang land to the plaintiff for love and affection, and under clause 4, the plaintiff undertook "to indemnify the transferor (defendant) against any expenses that may be incurred as a result of such sub-division or of obtaining separate title for the land transferred...". One acre of the defendant's land was eventually transferred to the plaintiff, but as no sub-division was done, their shares remained undivided in the land — the plaintiff being entitled to 4/11 and the defendant to 7/11. In the meantime, the D.S.P. became very interested to develop his wife's portion of the land, and by an agreement dated October 28, 1964, the plaintiff and the defendant agreed to have the whole land surveyed, sub-divided, and to obtain separate titles. In pursuance to clause 3 of the October agreement, the defendant also executed on the same day a power of attorney in favour of the plaintiff. (See pages 3 to 5 of the agreed bundle of documents). Under clause 2 of the October agreement, it was agreed by the parties that "all expenses incidental to the survey, sub-division and obtaining of separate titles shall be borne by both parties in proportion to the respective share of the land each owns", and clause 6 provides that "should the first party (the defendant) find it necessary to raise money to sub-divide, survey and develop the land and for that purpose deem it necessary to sell a portion of her land, in such event she shall give the second party (the plaintiff) the first opportunity of purchasing that portion of the land from her". However, these two clauses were deleted at the request of the defendant and, as such, there was no provision in the October agreement under which the defendant could be made contractually liable to pay anything to the plaintiff. Clause 3 of the power of attorney under which the plaintiff is authorised to develop the defendant's land was also amended to "obtaining separate titles". In any event, whilst the de-

fendant was in India, the whole land was eventually sub-divided into thirty eight lots, each with a separate title. Thirteen of them were registered in the plaintiff's name, twenty four in the defendant's, whilst one lot was surrendered to the State Government as road reserve. The D.S.P. also completed his housing project on the lots owned by his wife, whilst the defendant has now sold all her land as vacant building lots.

In her statement of claim, the plaintiff alleges she has incurred the following expenses:—

|                                                              |                    |
|--------------------------------------------------------------|--------------------|
| (i) Premium paid for conversion of title                     | \$10,450.00        |
| (ii) Assessments paid to Town Council, Klang                 | 2,925.00           |
| (iii) Survey fees paid                                       | 2,035.00           |
| (iv) Miscellaneous payments to the Collector of Land Revenue | 715.00             |
| (v) Solicitors' fees paid                                    | 2,500.00           |
| Total:                                                       | <u>\$18,625.00</u> |

Out of this total sum, it is contended that the defendant's share of the expenditure is \$11,843.28. It is not at all clear how the plaintiff came to this figure, but I can only assume that it has been calculated on the basis of the defendant's undivided share of the land as envisaged by clause 2 of the October agreement which has already been deleted. In any event, the survey fee of \$2,035 has not been strictly proved by the plaintiff. Further, it is also admitted by learned counsel for the plaintiff that the sum of \$2,500 alleged to have been paid as solicitors' fees, has not in fact been paid. The defendant has refused to pay the sum alleged to be due to the plaintiff on the ground that she has never agreed to pay anything to the plaintiff. In this case, the plaintiff's claim is not based on the October agreement. Although in the pleadings, the plaintiff's cause of action is based on the power of attorney given to her by the defendant wherein the plaintiff was authorised by the defendant to pay and settle all the defendant's lawful debts and obtaining full and effectual releases for the same, in the course of the hearing, it was finally decided by learned counsel for the plaintiff that the plaintiff's claim is actually based on the provision of section 71 of the Contracts (Malay States) Ordinance, 1950 which provides:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

On the authority of the Privy Council case of *Siow Wong Fatt v. Susur Rotan Mining Ltd. & Anor.*,<sup>(1)</sup> in order to bring the plaintiff's claim under section 71, the plaintiff's act —

- (1) must be lawful;
- (2) must be done for another person;
- (3) must not be intended to be done gratuitously; and
- (4) must be such that the other person enjoys the benefit of the act.

On the evidence before me, I am satisfied that

A the act done by the plaintiff through her D.S.P. husband in the development of the land in question is lawful, having regard to the provision of the October agreement and the power of attorney dated October 28, 1964, and therefore the plaintiff has complied with condition (1). It is also not in dispute that the defendant has acquired twenty four building lots each with a separate title in place of her undivided share in the agricultural land, and as such she has enjoyed the benefit of the act of the plaintiff in carrying out the survey, conversion, sub-division and obtaining separate titles for the said land. In my view, condition (4) has also been satisfied.

B The issues to be decided in this case are, therefore, whether the plaintiff has fulfilled conditions (2) and (3). As regards condition (2), it is for the plaintiff to prove that the act done must be for the defendant and not merely incidental to her. To determine this issue, it is necessary to consider the circumstances which led to the conversion and sub-division of the defendant's portion of the land. It is important to recall that throughout this episode it was the plaintiff's husband who was interested in developing his wife's portion of the land. Being a Deputy Superintendent of Police, he was no doubt aware that in order to get maximum profit for his housing project and to avoid any unnecessary expenses and delay, the best way would be for both the plaintiff and the defendant to develop the whole land by jointly submitting a single plan for conversion and sub-division to the appropriate authority. Under the National Land Code, if the plaintiff were to do it alone, the land must first be partitioned and a separate title obtained by the plaintiff in respect of her undivided share in the land before a plan could be submitted for conversion and sub-division. Therefore, for the development project to succeed, it was necessary for the defendant to be brought into the scheme. However, unfortunately for the D.S.P., he was not on speaking terms with the defendant soon after his marriage with the plaintiff, although the plaintiff's relationship with the defendant continued to be cordial. As the defendant's consent must somehow be obtained, the obvious thing for the D.S.P. to do was to make use of the plaintiff to do all the persuasion. From the evidence, I am satisfied that the defendant was never really interested in the D.S.P.'s development project, and this can reasonably be inferred from the letter dated June 19, 1964 written by the plaintiff to the defendant. (See page 7 of the agreed bundle of documents). Notwithstanding the preamble to the October agreement, in my view, the defendant only agreed to the sub-division as a result of persistent persuasion and pressure from the plaintiff; and it was clearly out of affection for her that she finally succumbed to executing the October agreement and the power of attorney. The D.S.P.'s admission that he took an active part in the transaction is an under-statement. In fact, according to the evidence of Mr. Sothinathan, the solicitor who drew up all the relevant documents in this case, all along it was the D.S.P. who gave him the instructions as to the contents of the October agreement. In fact, there can be no doubt that he is the brain behind the whole scheme including the initiation of the present proceedings. The defendant's reluctance to participate

in the whole scheme of the D.S.P. can be inferred from the following evidence. First, there is the evidence that the defendant had refused to build houses on her portion of her land as was done by the plaintiff, despite promise of good profits. Secondly, her immediate reaction to the contents of the October agreement and the power of attorney leading up to the deletion of clause 2 and clause 6 of the agreement and amendment of clause 3 of the power of attorney manifestly showed that she had no intention at any time to develop her portion of the land or to contribute to the expenses incidental to the survey, sub-division and obtaining of separate titles. Both the October agreement and the power of attorney were executed by the defendant at the same time; and, in my view, to ascertain the intention of the parties, both documents should be read together. What transpired at the time of the execution of these two documents is extremely relevant in this case. In examination-in-chief, Mr. Sothinathan testified:

"Before the agreement was executed, the defendant wanted clauses 2 and 6 to be deleted, and also to amend clause 3 of the power of attorney. When she raised this matter, I thought of re-doing the document and the power of attorney. I told this to plaintiff and defendant. The plaintiff rang her husband. I also spoke to him about it. Then it was decided to leave the documents as they were with the deletions and amendment, as the defendant was going to India...."

This witness also said in answer to questions by the court:

"I did explain to both plaintiff and defendant the effect of deletion of clauses 2 and 6 in the second agreement. I told them the agreement became vague as regards expenses, because after striking out, it does not say who should pay or who should not pay. They discussed among themselves and plaintiff talked to her husband by phone. It was then about 11 a.m. I also explained to plaintiff's husband of the effects of the deletions by phone. I did explain to him the full implication. He said the plaintiff and defendant could come to their own terms and he agreed to the deletions."

From these evidence, it can reasonably be inferred that at the material time when the October agreement and the power of attorney were executed, both the D.S.P. and the plaintiff were merely concerned with obtaining the consent of the defendant to make a joint application with the plaintiff for sub-division of the whole land to enable the D.S.P. to proceed with his housing project. They were not then concerned as to who should bear the expenses for sub-division. After the two documents were executed, the defendant left for India and the D.S.P. happily proceeded to sub-divide the land.

Under the circumstances of this case, it is my finding that, when the D.S.P. converted and sub-divided the land, he was solely motivated by the desire to accomplish the housing scheme for the plaintiff. The true object of the sub-division was for the development of the plaintiff's portion of the land. Sub-dividing the defendant's portion of the land was merely incidental to enable the D.S.P. and the plaintiff to proceed with their housing project. In the final analysis, the sub-division was done not for the defendant but for the plaintiff herself, and as such condition (2) has not been satisfied. As was held in the case of *Ganapathi Bhatta & Anor. v. Sanna Sedu Beari*<sup>(2)</sup>:

"In a suit for compensation where the sole or dominant motive for the payment is not to save another man's property,

A the payment cannot be said to have been made for such other man and compensation under section 70 (which is equivalent to our section 71) cannot be given. The mere fact that the person can benefit by such payment is not sufficient."

Similarly, in the present case, it is my finding that the dominant and sole motive of the D.S.P. in carrying out sub-division of the whole land is to benefit himself and his wife in the housing project, and the mere fact that the defendant was thereby benefited is insufficient to fulfil condition (2). In short, the sub-division carried out by the D.S.P. was done for the plaintiff and was merely incidental to the defendant.

As regards condition (3), the burden is on the plaintiff to prove that the sub-division of the defendant's land was not intended to be done gratuitously. In my view, the fact that the plaintiff was willing to execute the agreement with the clause relating to payment of expenses deleted shows on the balance of probabilities that she was willing to bear all the expenses incidental to the sub-division in consideration of the defendant agreeing to making a joint application with her for sub-division. As stated earlier on, when the two documents were executed, both the D.S.P. and the plaintiff were not concerned with the question of expenses. It should also be noted at this stage that, at the time when sub-division was being carried out, the defendant was most of the time in India, and there are no circumstances in this case to indicate that the plaintiff never intended the sub-division to be done gratuitously. On the contrary, the letter secretly written by the plaintiff dated June 17, 1971 is very illuminating. (See Exhibit P5). From the tone of her letter, she cannot properly be described as a willing party to the present action. It is apparent that she never had the intention of asking for compensation from the defendant. As stated earlier on, the D.S.P. is the real architect of the plaintiff's claim. In her own words she stated in the letter: "I know it is cruel and very mean of Athan (meaning her husband) to act in this way. One day he will realise he has done a very wrongful thing". My sympathy goes to the plaintiff, as she is obviously torn between her loyalty towards her adopted mother and love for her unscrupulous husband. I accept the evidence of the defendant that she never agreed at any time to pay anything to the plaintiff. Further, there is nothing inherently improbable that it was the intention of the plaintiff to carry out the sub-division gratuitously, particularly having regard to the provision of the May agreement, under which it was provided that the plaintiff undertook to indemnify the defendant against any expenses that might be incurred as a result of sub-division or of obtaining separate titles for the land.

As the plaintiff has failed to satisfy conditions (2) and (3) of the provision of section 71 of the Contracts (Malay States) Ordinance, her claim must be dismissed with costs.

*Claim dismissed.*

Solicitors: *Rajendra & Teik Ee; Chin, Sethu & Co.*